Anna Chin Kui Len (f) v RJ Realty Sdn Bhd & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01(A)-174–03 OF 2022, Q-01(A)-175–03 OF 2022, Q-01(A)-176–03 OF 2022, Q-01(A)-220–04 OF 2022 AND Q-01(A)-221–04 OF 2022

SUPANG LIAN, MOHD NAZLAN AND AZIZUL AZMI ADNAN JJCA

22 AUGUST 2024

Contract — Sale and purchase of property — Late delivery of vacant possession — Liquidated and ascertained damages ('LAD') — Apartment buyers in Sarawak paid booking fees to developer well before they signed sale and purchase agreements ('SPAs') for the properties — SPAs followed statutory contract of sale in Sarawak Housing Development (Control and Licensing) Regulations 2014 requiring developer to hand over vacant possession of completed units within 36 months from date of SPA or pay LAD from expiry of that period until date vacant possession was delivered — Housing Tribunal awarded buyers LAD for late delivery calculated from date booking fees was paid — Whether Tribunal's decision was sound and proper as it accorded with Federal Court's decision in PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60 ('PJD Regency') — Whether even though PJD Regency decision was based on housing development laws that applied only to Peninsular Malaysia, relevant provisions in those laws were almost identical to those prevailing in Sarawak — Whether both Peninsular Malaysia's Housing Development (Control and Licensing) Act 1966 and Sarawak's Housing Development (Control and Licensing) Ordinance 2013 and their respective Regulations were social legislation enacted to protect interests of house buyers — Whether aforesaid laws expressly prohibited collection of booking fees by developers from house buyers

The appellants in Appeals 174, 175 and 176 herein ('the buyers') had separately contracted to buy apartments from the first respondent housing developer, RJ Realty Sdn Bhd ('the developer'). Several months before they signed sale and purchase agreements ('SPAs') for those properties, the buyers had each signed a booking form and paid booking fees to the developer in respect of those properties. The SPAs which were eventually signed followed the Form C statutory contract of sale contained in the Sarawak Housing Development (Control and Licensing) Regulations 2014 ('the Sarawak HDR') issued under the Sarawak Housing Development (Control and Licensing) Ordinance 2013 ('the Sarawak HDO') which required the developer to hand over vacant possession of the completed properties to the buyers within 36 months from the date of the SPAs. As the developer delayed in delivery of vacant possession, the buyers filed claims with the second respondent housing tribunal ('the

Tribunal') for liquidated and ascertain damages ('LAD') against the developer as provided for in the respective SPAs. In keeping with the decision of the Federal Court in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60 ('*PJD Regency*'), the Tribunal awarded the buyers LAD calculated from the date they paid their booking fees. The High Court quashed the awards on hearing the developer's judicial review application and ordered the LAD to be calculated from the date of the respective SPAs instead. Despite considering *PJD Regency*, the High Court held that: (a) *PJD Regency* was based on the interpretation of the Housing Development (Control and Licensing) Act 1966 ('the HDA 1966') and the Regulations made thereunder ('the HDR 1989') which only applied to Peninsular; Malaysia and the provisions of which were different from Sarawak's housing development laws; (b) whilst *PJD Regency* found that the HDA 1966 was a social legislation to protect the interests of house buyers, the Sarawak HDO was enacted to 'strike a balance between the interest of house buyers and that of developers'; (c) contrary to the finding in *PJD Regency,* no contract for the purchase of the properties came into being when the buyers in the instant appeals paid their booking fees to the developer; (d) the payment of the booking fees merely gave the buyers an option to purchase the properties; and (e) the payment of the booking fees did not contravene Sarawak's housing development laws. The present appeals by the buyers, as well as Appeals 220 and 221 by the Tribunal, raised common grounds of objection against the High Court's decision. The developer, however, filed cross-appeals in Appeals 174, 175, 220 and 221 against the High Court's finding that the Tribunal had not acted unreasonably, illegally or in breach of natural justice in awarding the buyers LAD amounts that exceeded what they had claimed for in their statements of claim. The principal issues that arose for determination in the instant appeals were: (i) whether the Sarawak HDO and Sarawak HDR were social legislation enacted to protect the interests of house buyers; (ii) whether LAD should be calculated from the date of payment of the booking fees or from the date of the SPA; and (iii) whether payment of booking fees was regarded under Sarawak's prevailing housing development laws as an 'option to purchase' granted by the developer to a house buyer.

Held, allowing all the appeals, setting aside the High Court's decision, dismissing the developer's cross-appeals and ordering the developer to pay LAD to the appellant buyers as determined by the Tribunal (save in Appeal 176 where the LAD amount was varied to RM116,732.73):

(1) The long titles of both the HDA 1966 and the Sarawak HDO were virtually identical in all material respects. They both recited that the objective of both legislations was to protect the interests of house buyers as they were specifically recognised as the weaker party in a sale and purchase transaction. There was no focus on the need to strike a balance between the interests of house-buyers and that of developers. The High

Court failed to recognise the Sarawak HDO as a social legislation and did not construe the same in a fashion which would have rightfully accorded maximum protection to the appellant house buyers (see paras 29–30, 39 & 56).

(2) In the context of the HDA 1966 and the HDR 1989, the Federal Court in *PJD Regency* decided that given the status of the HDA as a social legislation and the need to protect house-buyers, being the weaker parties in the transaction, any LAD payable by the developer for late delivery of vacant possession should be calculated from the earlier point in time when the house-buyers had paid any booking fees. As the provisions in the Sarawak HDO and the Sarawak HDR were more than similar, if not identical, to those in the HDA 1966 and the HDR 1989, the same principles of construction that were applied by the Federal Court in *PJD Regency* ought to apply to the Sarawak HDO and Sarawak HDR. The practice of dating SPAs well after the date the booking fees were collected prejudiced house buyers because, for example, developers could arbitrarily put a date on the SPAs with a view to extending the date for them to deliver up vacant possession (see paras 50, 52 & 95).

(3) On a proper construction of the Sarawak HDO and Sarawak HDR, the calculation of LAD for late delivery of vacant possession should begin at the time any booking fee was collected from the prospective buyer. This was the point in time when the SPA should have been rightfully entered into by the parties and accordingly dated because under both the HDR 1989 and the Sarawak HDR, payment of 10% of the purchase price was required immediately upon signing of the SPA. Just like reg 11(2) of the HDR 1989, reg 9(4) of the Sarawak HDR prohibited the developer from collecting any payment otherwise than in accordance with the statutorily-prescribed contract of sale between the house buyer and the developer. When construing the terms of the form of contract in Form C in the Sarawak HDR, regard ought to be had to the purpose of the Sarawak HDO and Sarawak HDR rather than to the mere literal meaning of the words used. Applying the same reasoning and construction adopted by the Federal Court in *PJD Regency*, the date of the SPA in the instant cases must be taken to be the date on which the booking fee was paid. If, instead, the date of the SPA was taken, this would condone the developer's attempt to bypass the statutory protections afforded to house buyers under the legislative scheme (see paras 69, 57–63 & 70–72).

(4) Nowhere in the Sarawak HDO or Sarawak HDR (or in the HDA 1966 or HDR 1989, for that matter) was it stated that payment of booking fee by the house buyer constituted an option to purchase. The booking form, in fact, required the buyer to execute the SPA within 30 days whereupon the booking fee would go towards making up the 10% deposit that had

to be paid upon execution of the SPA. This clearly showed that the booking fee was not an option to purchase but was part of the 10% deposit payable upon execution of the SPA (see paras 84 & 90–91).

(5) In the light of the status of the Sarawak HDO and Sarawak HDR as a social legislation, the clear prohibition against the collection of booking fees and the absence of any basis for an option to purchase in the statutory SPA under the Sarawak HDR, the High Court's conclusion that the LAD calculation should begin from the SPA date and not from the date of payment of the booking fees was unsustainable and had to be set aside (see para 104).

(6) The notices of cross-appeal filed by the developer were struck out for being incompetent as they did not relate to the appeals brought by the appellants. The notices were bad in law and of no effect as they were against the High Court's finding that the Tribunal's awarding of LAD sums higher than what the house buyers had pleaded for was not unreasonable, illegal or in breach of natural justice. This was not a ground or issue in the main appeals of the appellants. The appellants were asking for the awards of the Tribunal, which had calculated the LAD from the date of payment of the booking fees, to be reinstated. The developer's cross-appeals, therefore, did not fall within the ambit of r 8 of the Rules of the Court of Appeal 1994. In any event, there were no merits in the notices of cross-appeal as the Tribunal's awards had correctly followed the Federal Court's decision in *PJD Regency* (see paras 119, 121, 126–127, 131–132 & 137).

[Bahasa Malaysia summary

Perayu-perayu dalam Rayuan 174, 175 dan 176 di sini ('pihak pembeli') telah secara berasingan memasuki kontrak untuk membeli pangsapuri tersebut daripada pemaju perumahan responden pertama, RJ Realty Sdn Bhd ('pemaju'). Beberapa bulan sebelum mereka menandatangani perjanjian jual beli ('SPA') untuk hartanah tersebut, pembeli masing-masing telah menandatangani borang tempahan dan membayar fi tempahan kepada pemaju berkenaan dengan hartanah tersebut. SPA yang akhirnya ditandatangani mengikut kontrak jualan berkanun Borang C yang terkandung dalam Peraturan-Peraturan Pemajuan Perumahan Sarawak (Kawalan dan Pelesenan) 2014 ('HDR Sarawak') yang dikeluarkan di bawah Ordinan Pemajuan Perumahan Sarawak (Kawalan dan Pelesenan) 2013 ('HDO Sarawak') yang mengkehendaki pemaju menyerahkan milikan kosong hartanah yang telah siap kepada pembeli dalam tempoh 36 bulan dari tarikh SPA. Memandangkan pemaju melambatkan penghantaran milikan kosong, pembeli memfailkan tuntutan dengan tribunal perumahan responden kedua ('Tribunal') untuk ganti tertentu dan ditetapkan ('LAD') terhadap pemaju seperti yang diperuntukkan dalam SPA masing-masing. Selaras dengan keputusan Mahkamah Persekutuan dalam *PJD Regency Sdn Bhd lwn Tribunal Tuntutan*

Pembeli Rumah & Anor dan rayuan lain [2021] 2 MLJ 60 ('*PJD Regency*'), Tribunal memberikan awad kepada pembeli LAD yang dikira dari tarikh mereka membayar fi tempahan. Mahkamah Tinggi membatalkan awad apabila mendengar permohonan semakan kehakiman pemaju dan mengarahkan LAD dikira dari tarikh SPA masing-masing. Walaupun mempertimbangkan *PJD Regency*, Mahkamah Tinggi memutuskan bahawa: (a) *PJD Regency* adalah berdasarkan tafsiran Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('HDA 1966') dan Peraturan yang dibuat di bawahnya ('HDR 1989') yang hanya terpakai di Semenanjung Malaysia dan peruntukannya berbeza dengan undang-undang pemajuan perumahan Sarawak; (b) walaupun *PJD Regency* memutuskan bahawa HDA 1966 adalah perundangan sosial untuk melindungi kepentingan pembeli rumah, HDO Sarawak telah digubal untuk 'memotong a keseimbangan antara kepentingan pembeli rumah dan kepentingan pemaju; (c) bertentangan dengan dapatan dalam *PJD Regency*, tiada kontrak untuk pembelian hartanah itu wujud apabila pembeli dalam rayuan semasa membayar fi tempahan mereka kepada pemaju; (d) bayaran fi tempahan hanya memberi opsyen kepada pembeli untuk membeli hartanah; dan (e) bayaran fi tempahan tidak melanggar undang-undang pemajuan perumahan Sarawak. Rayuan semasa oleh pembeli, serta Rayuan 220 dan 221 oleh Tribunal, membangkitkan alasan bersama bantahan terhadap keputusan Mahkamah Tinggi. Pemaju, bagaimanapun, memfailkan rayuan balas dalam Rayuan 174, 175, 220 dan 221 terhadap keputusan Mahkamah Tinggi bahawa Tribunal tidak bertindak secara tidak munasabah, menyalahi undang-undang atau melanggar keadilan semula jadi dalam memberikan pembeli jumlah LAD yang melebihi apa yang mereka tuntut dalam pernyataan tuntutan mereka. Isu utama yang timbul untuk penentuan dalam rayuan semasa adalah: (i) sama ada HDO Sarawak dan HDR Sarawak adalah perundangan sosial yang digubal untuk melindungi kepentingan pembeli rumah; (ii) sama ada LAD perlu dikira dari tarikh pembayaran fi tempahan atau dari tarikh SPA; dan (iii) sama ada pembayaran fi tempahan digunapakai di bawah undang-undang pemajuan perumahan Sarawak yang lazim sebagai 'opsyen untuk membeli' yang diberikan oleh pemaju kepada pembeli rumah.

Diputuskan, membenarkan semua rayuan, mengetepikan keputusan Mahkamah Tinggi, menolak rayuan balas pemaju dan memerintahkan pemaju membayar LAD kepada pembeli perayu seperti yang ditentukan oleh Tribunal (kecuali dalam Rayuan 176 di mana jumlah LAD diubah kepada RM116,732.73):

(1) Tajuk panjang kedua-dua HDA 1966 dan HDO Sarawak adalah hampir sama dalam semua aspek material. Kedua-duanya menyebut bahawa objektif kedua-dua perundangan adalah untuk melindungi kepentingan pembeli rumah kerana mereka secara khusus diiktiraf sebagai pihak yang lebih lemah dalam transaksi jual beli. Tiada tumpuan terhadap keperluan untuk mencapai keseimbangan antara kepentingan pembeli rumah dan

pemaju. Mahkamah Tinggi gagal mengiktiraf HDO Sarawak sebagai perundangan sosial dan tidak menafsirkan perkara yang sama dengan secara haknya memberikan perlindungan maksimum kepada pembeli rumah perayu (lihat perenggan 29–30, 39 & 56).

(2) Dalam konteks HDA 1966 dan HDR 1989, Mahkamah Persekutuan dalam *PJD Regency* memutuskan bahawa memandangkan status HDA sebagai perundangan sosial dan keperluan untuk melindungi pembeli rumah, sebagai pihak yang lebih lemah dalam transaksi, sebarang LAD yang perlu dibayar oleh pemaju untuk penghantaran lewat bagi milikan kosong hendaklah dikira dari masa yang lebih awal apabila pembeli rumah telah membayar sebarang fi tempahan. Memandangkan peruntukan dalam HDO Sarawak dan HDR Sarawak lebih serupa, jika tidak sama, dengan peruntukan dalam HDA 1966 dan HDR 1989, prinsip pembinaan yang sama yang digunakan oleh Mahkamah Persekutuan dalam *PJD Regency* harus digunakan untuk HDO Sarawak dan HDR Sarawak. Amalan menetapkan tarikh SPA selepas tarikh bayaran tempahan dikutip menjejaskan pembeli rumah kerana, sebagai contoh, pemaju boleh sewenang-wenangnya meletakkan tarikh pada SPA dengan tujuan untuk melanjutkan tarikh untuk mereka menyerahkan milikan kosong (lihat perenggan 50, 52 & 95).

(3) Pada pembinaan sewajarnya HDO Sarawak dan HDR Sarawak, pengiraan LAD untuk penghantaran lewat milikan kosong hendaklah bermula pada masa apa-apa bayaran tempahan dikutip daripada bakal pembeli. Inilah masanya apabila SPA sepatutnya dimeterai secara sah oleh pihak-pihak dan bertarikh sewajarnya kerana di bawah kedua-dua HDR 1989 dan HDR Sarawak, pembayaran 10% daripada harga pembelian diperlukan serta-merta selepas menandatangani SPA. Sama seperti peraturan 11(2) HDR 1989, peraturan 9(4) HDR Sarawak melarang pemaju daripada mengutip apa-apa bayaran selain daripada mengikut kontrak jualan yang ditetapkan oleh undang-undang antara pembeli rumah dan pemaju. Apabila menafsirkan terma bentuk kontrak dalam Borang C dalam HDR Sarawak, perhatian harus diberikan kepada tujuan HDO Sarawak dan HDR Sarawak dan bukannya makna literal perkataan yang digunakan. Menggunakan alasan dan pembinaan yang sama yang diterima pakai oleh Mahkamah Persekutuan dalam *PJD Regency*, tarikh SPA dalam kes semasa mesti diambil sebagai tarikh di mana fi tempahan dibayar. Sebaliknya, jika tarikh SPA diambil, ini akan membenarkan percubaan pemaju untuk memintas perlindungan berkanun yang diberikan kepada pembeli rumah di bawah skim perundangan (lihat perenggan 69, 57–63 & 70–72).

(4) Tiada mana-mana pun dalam HDO Sarawak atau HDR Sarawak (atau dalam HDA 1966 atau HDR 1989, dalam hal itu) yang mana ia menyatakan bahawa pembayaran fi tempahan oleh pembeli rumah

merupakan pilihan untuk membeli. Borang tempahan, sebenarnya, memerlukan pembeli untuk melaksanakan SPA dalam tempoh 30 hari dan yuran tempahan akan digunakan untuk membuat deposit 10% yang perlu dibayar semasa pelaksanaan SPA. Ini jelas menunjukkan bahawa fi tempahan bukanlah opsyen untuk membeli tetapi merupakan sebahagian daripada deposit 10% yang perlu dibayar selepas pelaksanaan SPA (lihat perenggan 84 & 90–91).

(5) Memandangkan status HDO Sarawak dan HDR Sarawak sebagai perundangan sosial, larangan jelas terhadap kutipan fi tempahan dan ketiadaan sebarang asas bagi opsyen untuk membeli dalam SPA berkanun di bawah HDR Sarawak, kesimpulan Mahkamah Tinggi bahawa pengiraan LAD harus bermula dari tarikh SPA dan bukannya dari tarikh pembayaran fi tempahan adalah tidak dapat dipertahankan dan terpaksa diketepikan (lihat perenggan 104).

(6) Notis rayuan balas yang difailkan oleh pemaju telah dibatalkan kerana tidak kompeten kerana ia tidak berkaitan dengan rayuan yang dibawa oleh perayu. Notis-notis itu adalah buruk di sisi undang-undang dan tidak berkuatkuasa kerana ia bertentangan dengan keputusan Mahkamah Tinggi bahawa pemberian award jumlah LAD oleh Tribunal lebih tinggi daripada yang diplidkan oleh pembeli rumah adalah tidak munasabah, menyalahi undang-undang atau melanggar keadilan semula jadi. Ini bukan alasan atau isu dalam rayuan utama perayu. Perayu-perayu meminta award Tribunal, yang telah mengira LAD dari tarikh pembayaran fi tempahan, dikembalikan semula. Oleh itu, rayuan balas pemaju tidak termasuk dalam lingkungan k 8 Kaedah-Kaedah Mahkamah Rayuan 1994. Dalam apa jua keadaan, tiada merit dalam notis rayuan balas kerana award Tribunal telah mengikut dengan betul Keputusan Mahkamah Persekutuan dalam *PJD Regency* (lihat perenggan 119, 121, 126–127, 131–132 & 137).]

Cases referred to

Bodco Engineering and Construction Sdn Bhd v Tribunal for Housing Purchaser Claims & Ors [2017] 4 MLJ 501, CA (refd)

Douglas Ding Jangan & Ors v Kerajaan Negeri Sarawak & Ors [2021] 4 MLJ 946; [2021] 7 CLJ 653, FC (refd)

Faber Union Sdn Bhd v Chew Nyat Shong & Anor [1995] 2 MLJ 597, SC (refd)

Hazlinda bte Hamzah v Kumon Method of Learning Centre [2006] 3 MLJ 124; [2006] 2 CLJ 933, CA (refd)

Hoo See Sen & Anor v Public Bank Berhad [1988] 2 MLJ 170, SC (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577, FC (refd)

Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Bhd [2021] 6 MLJ 348, FC (refd)

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020]

6 MLJ 224; [2019] 8 CLJ 433, FC (refd)
PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60, FC (folld)
Remeggious Krishnan v SKS Southern Sdn Bhd (formerly known as MB Builders Sdn Bhd) [2023] 3 MLJ 1; [2023] 4 CLJ 36, FC (refd)
Sri Damansara Sdn Bhd v Voon Kuan Chien & Anor [2020] 4 MLJ 265; [2020] 5 CLJ 619, CA (refd)

Legislation referred to

Housing Developers Rules [SG] rr 8, 10, 11
Housing Developers (Control and Licensing) Regulations 1988
Housing Developers (Control and Licensing) Rules 1970 (repealed) r 10(3)
Housing Developers (Tribunal for Housing Purchaser Claims) Regulation 2010
Housing Development Act 1966 ss 16M, 16Q
Housing Development (Control and Licensing) Act 1966
Housing Development (Control and Licensing) Ordinance 2013 (Cap 29) s 42(1), (4), (6)
Housing Development (Control and Licensing) Regulation 1989 regs 11, 11(2), Schedule G, cl 24(1), Schedule H, cl 25
Housing Development (Control and Licensing) Regulations 2014 reg 9(1), (4), Schedule 3, Form C
Housing Development (Control and Licensing) Rules 2008 reg 10
Interpretation Acts 1948 and 1967 s 17A
Interpretation Ordinance 2005 (Cap 61) s 9
Rules of Court 2012 O 53 r 2(3)
Rules of the Court of Appeal 1994 rr 5, 5(4), 8, 8(1)

Appeal from: Application for Judicial Review Nos KCH-13–1/3 of 2021 (HC1), KCH-13–5/4 of 2021 (HC1) and KCH-13–6/4 of 2021 (HC1) (High Court, Kuching)

Daniel Ling (with Jackson Ngu) (Ling Advocates) in Appeal Nos Q-01(A)-174–03 of 2022, Q-01(A)-175–03 of 2022 and Q-01(A)-176–03 of 2022 for the appellants.
McWillyn Jiok (with Syed Rezif Afham bin Wan Alwi) (State Legal Officers) in Appeal Nos Q-01(A)-220–04 of 2022 and Q-01(A)-221–04 of 2022 for the appellant.
Azrin Ahmat (with Bong Ah Loi, Allan Lao and Soo Tong Jack) (Suhaili & Bong) for the first respondent.
McWillyn Jiok (with Syed Rezif Afham bin Wan Alwi) (State Legal Officers) in Appeal Nos Q-01(A)-174–03 of 2022, Q-01(A)-175–03 of 2022 and Q-01(A)-176–03 of 2022 for the second respondent.

Mohd Nazlan J (delivering judgment of the court):

INTRODUCTION

[1] Five appeals were heard before us against a decision of the High Court at Kuching in a judicial review proceeding, which had granted an order of certiorari to quash parts of three awards made by the Tribunal of Housing Purchaser's Claims Sarawak. These awards had calculated the liquidated ascertained damages ('the LAD') for a delay in the delivery of vacant possession under the sale and purchase agreement ('the SPA') prescribed under the Sarawak Housing Development (Control and Licensing) Regulations 2014 to be from the date of payment of booking fees.

[2] The learned judicial commissioner of the High Court ('the learned JC') held that the three awards were made in error of law, in that the LAD should be calculated from the date of the SPA. The awards of the Tribunal were therefore set aside.

[3] As the issues raised in the five appeals arising from the three awards were similar, as were those in the cross-appeals filed by the developer in four of the appeals, all parties agreed that the outcome of one appeal ought to bind the four other appeals.

[4] At the conclusion of the hearing, we allowed all the appeals, and dismissed the cross-appeals. These are our reasons.

KEY BACKGROUND FACTS

[5] The five appeals were registered as Q-01(A)-174–03–2022 ('Appeal 174'), Q-01(A)-175–03–2022 ('Appeal 175'), Q-01(A)-176–03–2022 ('Appeal 176'), Q-01(A)-220–04–2022 ('Appeal 220') and Q-01(A)-221–04–2022 ('Appeal 221'). All five resulted from the said decision of the High Court delivered on 24 March 2022.

[6] The appellants in Appeals 174, 175 and 176 were three different house purchasers, respectively, and the appellant in Appeals 220 and 221 was the Tribunal of Housing Purchaser's Claims Sarawak or *Tribunal Tuntutan Pembeli Rumah Sarawak* ('the Tribunal'). The appeals in Appeals 220 and 221 by the Tribunal also concerned the cases in Appeals 174 and 175 and raised the same key issues in Appeals 174 and 175. The Tribunal was also the second respondent in Appeals 174, 175 and 176. The developer — RJ Realty Sdn Bhd was the first respondent in all five appeals.

[7] The claims of the appellants in Appeals 174, 175 and 176 against the first respondent were therefore for all intents and purposes similar, and all three were also represented by the same counsel who before us raised the key issues common to all three appellants, as agreed by all parties. The Tribunal, as the appellant in Appeals 220 and 221 also raised submissions consistent with those of the three appellant house buyers.

[8] There were also cross-appeals filed by the first respondent in Appeals 174 and 175 as well as in Appeals 220 and 221 on the ground that if the main appeals were allowed, the awards of the Tribunal ought to be varied as it had granted the LAD sum in excess of that pleaded by the appellant house buyers.

[9] The three appellants purchased their respective apartments at 'Ferra Blessed Residences' from the first respondent. Before they executed the SPAs, they had each signed a booking form and paid a booking fee of RM20,000 to the first respondent for the purchase of one unit of the apartment respectively. Thus, for example, in the case of the appellant in Appeal 174, the purchase price of her parcel was RM699,900, and she signed the booking form and paid the booking fees on 24 April 2015.

[10] The SPAs in the three appeals were however in fact only executed several months later, and in the case of the appellant in Appeal 174 the SPA was signed on and dated 27 July 2016.

[11] Pursuant to reg 9(1) of the Sarawak Housing Development (Control and Licensing) Regulations 2014 ('the Sarawak HDR 2014'), issued under the Sarawak Housing Development (Control and Licensing) Ordinance 2013 ('the Sarawak HDO 2013'), every contract of sale for the sale and purchase of a housing accommodation in a subdivided building, like in the case of the three appellants herein, shall be in Form C in the Schedule. Section 9(1) of the Sarawak HDR 2014 on Contract of Sale states:

> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the sub-divisional portion of land appurtenant thereto shall be in Form B in the Schedule and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in Form C in the Schedule.

[12] The prescribed format of the sale and purchase agreement (subdivided building) in turn provides in cl 23, that the relevant parcel shall be completed by the vendor and vacant possession to the parcel shall be handed over to the purchaser within 36 calendar months *from the date of the SPA*.

[13] On 25 November 2019, which was plainly a date more than 36 months from the date of the appellants' respective SPAs (and significantly even more vis a vis the date of the payment of booking fees), the first respondent, as the vendor developer issued the requisite notice of handing over of vacant possession to all three appellants for their respective units. None of the three chose to take possession within the stipulated 14-day period on account of defects and non-compliance with specifications. All three appellant house buyers then filed their claims at the Tribunal against the first respondent developer for LAD for the late delivery of vacant possession of their respective apartment units, as well as for rectification works.

[14] The Tribunal, as mentioned, awarded all three appellants LAD as calculated from the date of payment of the booking fees and ordered the first respondent to rectify the defects identified by the appellants. The first respondent subsequently applied for judicial review which resulted in the High Court quashing part of the awards, granting the LAD from the SPA date instead, whilst not interfering with the Tribunal's award on the order for rectification works.

ESSENCE OF THE VERDICT OF THE HIGH COURT

[15] Central to the judgment of the learned JC was the High Court's position on the Federal Court decision in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60 ('*PJD Regency*'), much relied on by the appellants and the Tribunal, which had ruled that the calculation of the 36-month period given for LAD purposes should be from the date of payment of booking fees instead of the date of the SPA.

[16] The High Court ruled that the Housing Development (Control and Licensing) Act 1966 ('the HDA 1966'), which is applicable to Peninsular Malaysia is not in pari materia with the Sarawak's Housing Development (Control and Licensing) Ordinance 2013 ('the Sarawak HDO 2013') which governed these appeals in light of what the learned JC referred to as differences in the provisions in the two statutes.

[17] The learned JC concluded, among others, by making reference to the *Hansard*, that whilst the HDA was, as found by *PJD Regency*, a social legislation enacted to protect the interest of house buyers, the Sarawak HDO 2013 was enacted to strike a balance between the interest of the house buyers and that of the developers.

[18] The learned JC further held that on the facts of the three awards now before us in Appeals 174, 175 and 176, no sale and purchase agreement had been formed at the time of the payment of the booking fee.

[19] It was instead held that all that had happened was the prospective purchaser and the developer had entered into an agreement whereby in consideration of the payment of the booking fee, the developer had granted a right or option to the prospective purchaser to purchase the respective unit, to the exclusion of others.

[20] Significantly, it was also concluded by the High Court that the SPA would only be established in the event the prospective purchaser exercised the option to purchase the respective unit, such that there was no contravention of any provisions requiring the instalment payments under the contract to be paid in the manner prescribed under the applicable regulations.

[21] As such, if a prospective purchaser declined to exercise the option to purchase and the booking fee was either refunded or forfeited (or partially refunded and partially forfeited), the High Court held that there would be no sale and purchase agreement and the question of whether the booking fee constituted part payment of the purchase price would not arise.

THE PRINCIPAL GROUNDS OF APPEAL

[22] Based on the memorandum of appeal and the written submissions in these appeals, as well as the oral submissions made at the hearing before us, the key grounds of appeal may be distilled and broadly grouped in the following two questions.

[23] The first was whether the Sarawak HDO 2013, inclusive of the regulations made thereunder — the Sarawak HDR 2014, was a social legislation enacted to protect the interest of house buyers.

[24] The second was whether the date of calculation of the LAD began from the date of payment of the booking fee or from the date of the SPA. This question was also related to that whether the Sarawak HDO 2013 and the Sarawak HDR 2014 allowed for the payment of booking fees as an option to purchase granted by the developer to the prospective purchaser.

[25] Our analysis of the above-stated two principal grounds of appeal will also involve examination of the other, some more subsidiary issues related to these principal grounds, as well those concerning the cross-appeals.

ANALYSIS AND FINDINGS OF THIS COURT

Whether the Sarawak HDO 2013 is a social legislation

A The long title of the legislation

[26] The learned JC in his grounds of judgment answered this first question in the affirmative, in the following terms:

B [8] While there are similarities between the legislative scheme in Peninsular Malaysia and the legislative scheme in Sarawak, there are also differences.

[9] In the view of this court, the two legislative schemes are not in pari materia.

[10] In *PJD Regency*, the Federal Court had described the West Malaysia 1966 as a social legislation, enacted to protect the interests of house buyers.
C

[11] The first Sarawak legislation on housing development, the Sarawak Housing Developers (Control and Licensing) Ordinance 1993, (hereinafter, the 'Sarawak Ordinance 1993') was enacted 27 years later in 1993.

[12] In 2013, the Sarawak Ordinance 1993 was replaced by the Sarawak Ordinance 2013, which is almost half a century after the West Malaysia Act 1966.
D

[13] As was made clear from the speech of the then Minister of Local Government and Housing of Sarawak during the second reading of the 2013 Bill, the Sarawak legislature had from the outset aimed to strike a balance between the interests of the house buyers on the one hand and the interests of developers on the other: ...
E

[27] We were unable to agree with the conclusion of the High Court for two principal reasons.

F **[28]** First, the Federal Court in *PJD Regency*, in holding that the HDA 1966 was a social legislation enacted for the protection of interest of purchasers stated as follows:

[27] That the HDA 1966 and its subsidiary legislation are social legislation is settled beyond dispute ...
G

[28] The long title of a statute is relevant to its interpretation (see s 15 of the Interpretation Acts 1948 and 1967). The long title of the HDA 1966 provides in no uncertain terms that it exists, in Peninsular Malaysia, for the protection of the interest of purchasers and for matters connected therewith.

H [30] It appears that even since 1982, housing developers have continued to devise ingenious, and if we may say so, devious schemes to overcome the protections afforded to purchasers by the scheme of the HDA 1966. We would say here that booking fees are one such invention. How is the concept of social legislation relevant to the weeding out of such practices?

I [31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legislation is 'social legislation'. A social legislation is a legal term for a specific set of laws passed by the Legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. Given that one side always has the upper hand against the other due to the inequality of

bargaining power, the State is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class.

[29] We observed that despite stating that there were similarities (as well as differences) in the two statutes, the High Court did not identify any of the similarities between the two statutes, specifically the obvious one — as so stated in *PJD Regency* — which was that the long titles of both the HDA 1966 and the Sarawak HDO 2013 were worded virtually identically in all material respects.

[30] They both recite that the objective of both legislations is to protect the interests of purchasers. Thus, the long title to the Sarawak HDO 2013 provides:

> An Ordinance to provide for the control and licensing of the business of housing development in Sarawak, the protection of the interest of purchasers and for matters connected therewith.

[31] The HDA 1966 in identical fashion states as follows:

> An Act to provide for the control and licensing of the business of housing development in Peninsula Malaysia, the protection of the interest of purchasers and for matters connected therewith.

[32] It is clear as day that these provisions are virtually the same. It cannot be emphasised enough that the characterization of a legislation as a social legislation governs the rules that are to be applied in construing such a legislation. Thus, the Federal Court, more recently in *Remeggious Krishnan v SKS Southern Sdn Bhd (formerly known as MB Builders Sdn Bhd)* [2023] 3 MLJ 1; [2023] 4 CLJ 36 clearly stated that as the HDA 1966 was enacted as a piece of social legislation to protect house buyers, any term or provision in the statute must be interpreted in a way which would ensure maximum protection for the house buyers against the developer.

[33] The learned JC did not even consider whether the Sarawak housing development laws was a form of a social legislation, let alone touch on the long title of the relevant statutes, despite having concluded that the Sarawak HDO 2013 and the HDA 1966 were not in pari materia.

[34] Before us too, the first respondent submitted that there were major differences in the clauses of the SPA under the Sarawak HDR 2014 when compared with the prescribed SPA under the HDR 1989. However, in our view, these were entirely inconsequential, if not wholly without basis. Just to take one example, is the provision on the handing over of vacant possession where the first respondent attempted to demonstrate that cl 23 of the prescribed SPA (Form C) under the Sarawak HDR 2014 contained an

additional requirement, said not to be part of the Peninsular Malaysia's HDR 1989, in that the handing over within 36 months was subject to the purchaser having duly paid for all the instalments and not be in breach of any of the terms and obligations of the SPA.

[35] We need only mention that as correctly highlighted by the appellants however, contrary to the submission of the first respondent, the effect of such clause was in fact found in cll 25 and 27(d) of the prescribed SPA for Schedule H to the HDR 1989, which ought to be read together, and which requirements are similar to cll 23 and 25 of the prescribed SPA as per Form C under the Sarawak HDR 2014.

The Hansard

[36] Secondly — the references made by the learned JC to the *Hansard*. In our observation, whilst there were numerous references recorded in *Hansard* from the speeches of the elected representatives of the State Legislature of Sarawak to the need to protect the interests of house buyers, the learned JC chose only to refer to the passages where reference was made to the need to balance the interests of developers and house buyers. We are nevertheless also mindful of the status of reference to *Hansard*, as instructively stated by Her Ladyship Tengku Maimun (Chief Justice) in *Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Bhd* [2021] 6 MLJ 348 as follows:

> [53] We are aware that the *Hansard* is not a definitive corpus on the law. The speeches are relevant in terms of statutory construction when the courts are required to ascertain the meaning of the words used in statutes. The courts retain the obligation to construe an Act of Parliament based on the language employed by applying settled cannons of construction but they are by no means bound by what Parliamentarians say what the law means if the actual language of the statute is broader or narrower than the intent expressed or implied in the process of passing that statute. It could therefore be said that the Hansard is merely the starting point on interpretation and not the end-goal.

[37] In the grounds of judgment of the learned JC, it was stated as follows:

> [13] As was made clear from the speech of the then Minister of Local Government and Housing of Sarawak during the second reading of the 2013 Bill, the Sarawak legislature had from the outset aimed to strike a balance between the interests of the house buyers on the one hand and the interests of developers on the other:
>
> > Tuan Speaker, the main objective of the Bill is to provide for legislation, to control and regulate housing development in Sarawak. This new Bill shall repeal the current Housing Developers (Control and Licensing) Ordinance 1993 as the former will provide more comprehensive legislation that is ensure better control of the State housing sector ...
> >
> > *Tuan Speaker, when it was first introduced and passed in DUN Sitting on 16th*

> *November 1993, the Bill aimed at balancing the interests between the needs of housing developers and the rights of house buyers*. It is thus crucial that while the Bill intends provide protection for house buyers, it should not at the same time, create obstacle to bona fide and genuine housing developers or stifle the growth of the housing sector in the State ...
>
> Firstly, once the new Bill is passed and gazetted, my Ministry will be introducing new regulations on the licensing of private housing developer.
>
> This regulation are to replace the existing one as some of the current provision are either already outdated or need to be amended as well to suit the current development and address new issues in the housing sector. This will cover amongst others the enhanced housing developers licensing requirements, procedures governing the administration and control of the housing development account, and an updated sale and purchase sample. In formulating new regulations, *I want to assure the affected stakeholders in particular the housing developers that we would balance their interest and obligations with those of the house purchasers and the public at large*. At the same time, we also want to ensure that any new regulations or procedure that we would be introducing and enforcing should not be in anyway hinder, the growth of the housing sector as a whole. As it is important that this sector continue to remain vibrant and robust ... (Emphasis added.)

[38] As correctly highlighted by the counsel for the appellants in all five appeals however, the learned JC did not at all mention the other speeches of the then Minister of Local Government and Housing of Sarawak as well as the other members of state legislative assembly, a summary of which is set out hereunder:

> *Minister of Local Government and Housing of Sarawak*
>
> *(Debate on Housing Development (Control and Licensing)*
>
> *Bill 2013: Hansard, 19.11.2013 at p 18–19)*
>
> Therefore, in light of this development we have to update and improve the *current Ordinance taking into consideration the development of laws and regulations on housing at the Federal level and the new trends* and issues affecting the housing sector at the State level. The new and amended provisions would attempt to *give stronger safeguard to house buyers in respect of their rights and interest* vis a vis in dealing with housing developers. The introduction of this new Bill was also *prompted by the numerous complaints from house buyers directed at the developers* which we also need to address systematically including through strengthening the existing legal provision. At the same time, while the problem of abandoned housing in Sarawak is not that serious and still under control it is also crucial that initial step be undertaken to mitigate the occurrence of such cases in future. Thus, one of the key measures is to provide proper legal framework on this subject in the current Ordinance.
>
> ...

Tuan Speaker, the *need to further strengthen the protection of house purchasers' interests are self- evident in that shoddy products would lead to tremendous distress to house purchasers*. They have to live with it and their children and their next of kin would also have to endure the unpleasant situation sometimes with no light at the end of the tunnel. Those directly affected by abandoned housing projects would even be in a much more dire situation.

Tuan Speaker, therefore it is proposed that the new Ordinance be introduced and the current Housing Developers (Control and Licensing) Ordinance 1993 be repealed accordingly. In order to cater for a wider scope of the Bill, which is not only to regulate the housing developers, but at the same time to protect the interest of house purchasers, it is proposed that a new title be adopted, and the Bill is proposed to be cited as the Housing Development (Control and Licensing) Bill 2013. Unlike the previous one which is Housing Developers (Control and Licensing) Ordinance. This new Bill retains most of the original provisions in the 1993 Ordinance with the exception of new and amended provisions which I am going to highlight henceforth.'

YB Dr Annuar Bin Rapaee

(Debate on Housing Development (Control and Licensing) Bill, 2013: Hansard, 19.11.2013 at p 47)

I am therefore delighted that the government has decided to come up with *this policy and legal framework to further protect the house buyer. With so many houses to be built in the near future, this Ordinance will go a long way in enhancing protection of house buyers' interest and at the same time to mitigate the problem of abandoned housing through the improved system of enforcement, compliance and licensing requirement*.

As I have said, house buyers are widely exposed to the risk and disadvantages when come to own proper home which to most of the people come only once in a lifetime. The house buyers are always on the under- belly of the housing developers and yet they have very little protection. They have limited avenue to address their issues with the housing developers. The housing industry and the finance industry which is tied to the development of housing are always having the upper hand and even almost a free hand in moving the industry and along the way have little legal mitigation or intervention from the law for them to morally conduct their business.

YB Yap Hoi Liong

(*Debate for Housing Development (Control and Licensing) Bill, 2013: Hansard, 19.11.2013 at p 51*)

Inadequate Protection Afforded to Purchasers

Tuan Speaker, *it is trite that this Bill is seeking to improve the effectiveness and efficiency so as to provide adequate protection to the home purchasers*. It is also observed that the new Bill does not provide any express provision on the contract of sale which I considered is important in order to protect the purchasers of the houses where the majority of them are layman on the street.

> *Therefore, the legislature is under obligation to provide adequate protection by having standard form of contract of sale so as to protect the interest of the purchasers*. Hence, I propose contract of sale in the Form G or Form H together with schedule thereto of the 1993 Ordinance be incorporated or be considered in this Bill. (Emphasis added.)

[39] Consistent with *PJD Regency*, from the above proceedings in the Sarawak Legislature as recorded in the Hansard, it is clear that the precursor to the present Sarawak HDO 2013 was enacted to protect the interests of the house buyers and that the introduction of the Sarawak HDO 2013 was to fortify the safeguards conferred by the previous Ordinance. They emphasised the necessity of safeguarding the interests of house buyers who were specifically recognised as the weaker parties in the sale and purchase transaction. There was no focus on the need to strike a balance between the interests of the house buyers and the developers.

Whether the date of calculation of the LAD begins from the date of payment of the booking fee and not from the date of the SPA

[40] This is the crux of these appeals.

Similar provisions in the prescribed contracts

[41] The issue in the instant case came to light as the LAD claims of the three appellants were made pursuant to cll 23 and 26 of the statutory sale and purchase agreement as prescribed under the aforementioned reg 9(1) of the Sarawak HDR 2014. As stated earlier, delivery of vacant possession must be made under cl 23(1) of the prescribed SPA within 36 calendar months from the date of the SPA. By reason of the delay, cl 23(2) of the SPA kicked in, which, it was not disputed, makes the developer liable to pay LAD calculated from day to day at the rate of 8% per year of the purchase price from the expiry date of the delivery of vacant possession — the said 36-month period — until the date of delivery of vacant possession.

[42] This 36-month period is stated under cl 23(1) of the prescribed SPA to commence from the date of the SPA. It was therefore suggested that the LAD calculation on the 36-month period ought to start from the date of the SPA. However, in the appeals before us, as was the situation in *PJD Regency*, the house buyers had already made payment of booking fees prior to the execution of the SPA.

[43] The Federal Court in *PJD Regency* examined the HDR 1989, specifically on the provision concerning the statutory SPA prescribed under Schedule H, in cl 25 of the SPA which is very similar to cl 23 of the SPA

prescribed under the Sarawak HDR 2014.

[44] It was not in dispute, we reiterate, that the parcels purchased by the three appellant house buyers in these appeals were subject to the prescribed contract of sale in Form C under reg 9 of the Sarawak HDR 2014. For the purposes of these appeals, the clauses in the prescribed contract which are of relevance are on the delivery of vacant possession of the parcels to the house buyers and on the LAD for any delay in such delivery.

[45] These are found in cl 23 of the prescribed contract in Form C, which provides as follows:

> 23. *HANDING OVER VACANT POSSESSION*
>
> (1) Subject to clause 24 hereinafter and provided that the Purchaser duly pays the instalments as provided and at the time set out in clause 3 and duly pays all sums and moneys due or payable by him to the Vendor pursuant to this Agreement, and provided further that the Purchaser shall have performed and observed and shall not be in breach of any of the terms and conditions on his part to be performed and observed contained in this Agreement, *the said Parcel shall be completed by the Vendor and vacant possession to the said Parcel, shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement*.
>
> (2) If the Vendor fails to deliver vacant possession of the said Building in the manner stipulated in sub-clause (1), the Vendor *shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of eight per centum (8%) per year of the purchase price from the expiry date of delivery of vacant possession in sub-clause (1) until the date of the delivery of vacant possession of the said Building*. Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Building.
>
> (3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Property. (Emphasis added.)

[46] Clause 23 therefore provides that where the developer is required to deliver vacant possession of the parcels and to complete the common facilities of the residential development within the stipulated 36 months, any failure on the part of the developer entitles the purchasers to be paid liquidated damages by the developer.

[47] In *PJD Regency*, focus was on the examination of the meaning of the words 'from the date of this agreement' contained respectively in cl 24(1) of Schedule G to the HDR 1989 and cl 25 of Schedule H to the HDR 1989, the material parts of which read as follows:

Schedule G

24 Time for delivery of vacant possession

(1) Vacant possession of the said Property shall be delivered to the Purchaser in the manner stipulated in cl 26 within 24 months *from the date of this Agreement*.

...

(4) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Property.

Schedule H

25 Time for delivery of vacant possession

(1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in cl 27 within 36 months *from the date of this Agreement*.

...

(4) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel. (Emphasis added.)

[48] As can be readily seen above, the words '*from the date of this Agreement*' also similarly appear in the aforementioned cl 23(1) of the prescribed SPA under the Sarawak HDR 2014.

[49] So, the question is — does the calculation for LAD under the Sarawak HRD 2014 begin from the payment of the booking fees which is prior to entry of the SPA or only upon the execution of the SPA?

[50] Having regard to the decisions of the Supreme Court in *Hoo See Sen & Anor v Public Bank Berhad* [1988] 2 MLJ 170 and *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597, the Federal Court in *PJD Regency* has already authoritatively answered this in the context of the HDA 1966 and the HDR 1989 — in respect of provisions similar to the ones in question in these appeals — in that given the status of the statute as a social legislation and the need to protect house buyers being the weaker parties in the transaction, any LAD for the failure of the developer to deliver vacant possession of the home units or parcels in adherence to the contractually stipulated time period should be calculated from the earlier point in time when payment is made by the house buyers of any booking fees.

[51] Her Ladyship Tengku Maimun (Chief Justice) answered the question of law in the leave application referred to the Federal Court in *PJD Regency* in the following terms:

A [89] We agree fully with the views expressed above and as such we answer all related leave questions on the common issue to the effect as follows:

> Where there is a delay in the delivery of vacant possession by a developer to the purchaser in respect of Scheduled Contracts under reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (Regulation 1989) enacted pursuant to s 24 of the Housing Development (Control and Licensing) Act 1966, the date for calculation of liquidated agreed damages ('LAD') begins from the date of payment of deposit/booking fee/initial fee/expression by the purchaser of his written intention to purchase and not from the date of the sale and purchase agreement literally.

[52] In our view, the provisions of the Sarawak HDO 2013 and the Sarawak HRD 2014 and those of the HDA 1966 and the HDR 2014, respectively, bear more than sufficient similarity, if not in identical terms, for us to conclude that the same principles of construction as determined by the Federal Court in *PJD Regency* ought to apply to the Sarawak HDO 2013 and the Sarawak HRD 2014. As such, the literal rule of construction is supplanted by a purposive one, applying s 17A of the Interpretation Acts 1948/1967, when construing the protective language of social legislation and that the terms of social legislation must be construed in a way to maximise the protection accorded to persons who are intended to be protected by the legislation.

[53] It is of interest to note that this court in the case of *Bodco Engineering and Construction Sdn Bhd v Tribunal for Housing Purchaser Claims & Ors* [2017] 4 MLJ 501 had interpreted cl 17(3) of the prescribed SPA under the previous Sarawak's Housing Developers (Control and Licensing) Regulations 1988 in a manner that exhibited the genesis of the judicial interpretation that housing development laws ought to be categorised as a social legislation.

[54] This was in respect of cl 17(3) of the prescribed SPA (on *Handing Over Vacant Possession*) which deemed the relevant building completed when the certificate of fitness for occupation had been issued, where the court ruled in the following terms:

> [38] Clause 17(3) of the SPA, which is peculiar only to the State of Sarawak, obviously is not there as a decorative item nor a product of verbosity. The formula in the said cl 17 was determined by the State Cabinet of Sarawak, led by its State Minister of Housing, *designed to protect home buyers after balancing the interests of the buyers and developers in Sarawak*. It is meant to be implemented and executed in the event of breaches in respect of cl 17(1) and (2). Hence, it is only appropriate to adopt in all the circumstances of the case, an interpretation that is in accord with s 17A of the Interpretation Acts 1948 and 1967 as were done by the learned judges in *Chinaya a/l Ganggaya v Sentul Raya Sdn Bhd* [2008] 2 MLJ 468; [2008] 3 CLJ 23 and *Hariram a/l Jayaram & Ors v Sentul Raya Sdn Bhd* [2003] 1 MLJ 22; [2002] 4 CLJ 796. The said s 17A provides:

17A Regard to be had to the purpose of the Act

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[55] It is also of significance to recognise that there in fact exists the Sarawak Interpretation Ordinance 2005, which provision in its s 9 is virtually identically worded to that in s 17A of the Interpretation Act 1948/1967, the latter of which was referred to in *Bodco Engineering*, as shown above. Section 9 of the Sarawak Interpretation Ordinance 2005 reads as follows:

In the interpretation of a provision of an Ordinance, a construction that would promote the purpose or object underlying the Ordinance (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[56] The learned JC however did not recognise the Sarawak HDO 2013 as a social legislation and did not construe the same in a fashion which would rightfully accord maximum protection to the three appellant house buyers. On the contrary, the learned JC sanctioned the practice on the payment of booking fee prior to the execution of the SPA, for reasons that will be stated below.

Provisions on payment of booking fees

[57] It is not in dispute that in accordance with both the HDR 1989 and the Sarawak HDR 2014 the payment of 10% of the purchase price is required immediately upon the signing of the SPA. At the heart of the key issue in these appeals and in *PJD Regency* is the fact of the payment of booking fees by house buyers before their execution of the SPA.

[58] *PJD Regency*, as stated earlier, determined that the LAD for late delivery should be calculated from the date of the payment of booking fees, instead of from the date of the SPA. In *PJD Regency*, the Federal Court examined reg 11 of the HDR 1989 which provides as follows:

(2) No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.

[59] Even this very provision has been amended and expanded in 2015 such that no persons, instead of merely the developer, shall make collection of booking fees. This affords even greater protection to the house buyers. The present reg 11(2) now reads:

(2) No person including parties acting as stakeholders shall collect any payment by whatever name called except as prescribed by the contract of sale.

[60] Given these provisions, the Federal Court in *PJD Regency* held that the law clearly prohibits the collection of booking fees, howsoever described and that to limit the date of calculation of the LAD to the date in the SPA is to impliedly condone the collection of such booking fees. These following important observations by Her Ladyship Tengku Maimun (Chief Justice) provide further elucidation of the reasons for the decision, and thus merits reproduction:

> [49] Given the clear legislative intent, it follows that we are unable to read the Scheduled Contracts in these appeals literally. The legislative aim here is that any payment collected must be in accordance with the terms of the statutory contract of sale. Accordingly, to give effect to this legislative intent and in light of the collective status of the HDA 1966 and HDR 1989 as social legislation, it follows that where this illegal practice of booking fee is afoot, the date of the contract cannot be taken to mean the date printed in the Scheduled Contracts. Otherwise, this court would be condoning the developers' attempt in this case to bypass the statutory protections afforded to the purchaser by the legislative scheme put in place.
>
> ...
>
> [77] In these appeals, the prime idea behind the legislative framework is that the developers should be confined to a set timeline. Booking fees are prohibited yet the developers have continued to brazenly flout the law by calling it standard practice. At the same time, they very boldly demand that the statute be construed in their favour by strictly limiting the commencement period to the dates printed in those contracts.
>
> ...
>
> [85] Had the developers in the present appeals complied strictly with the terms of the scheduled contracts as statutorily prescribed, then the payment of the initial ten percent deposit and the signing of the statutory sale and purchase agreement would have been done simultaneously. The fact that they have nonetheless bypassed the statutory prohibition against the collection of booking fees, and the pro forma agreements being amply clear as to the fundamentals of the agreement, means that a bargain was indeed made at the time of the payment of the booking fee. In our judgment, the legislative intent was that the initial payment of monies, in the form of a deposit, is sufficient to constitute an intention to enter into a contract given that the agreement would have to be signed at the same time.'

[61] Now, regs 9(1) and (4) of the Sarawak HDR 2014 read as follows:

> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the sub-divisional portion of land appurtenant thereto shall be in Form B in the Schedule and where the contract of sale is *for the sale and purchase of a housing accommodation in a subdivided building, it shall be in Form C in the Schedule*.

...

(4) *No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale*. (Emphasis added.)

[62] Crucially, regs 9(1) and (4) of the Sarawak HDR 2014 which apply to the instant appeals are in pari materia with regs 11(1) and (2) of the HDR 1989. However, whilst it is manifest that the HDR 1989 and the Sarawak HDR 2014 both require the adoption of the statutorily prescribed SPA as provided in the scheduled forms and prohibit the collection of any payment by whatever named called otherwise than in accordance with the terms of the said scheduled SPA, the learned JC chose not to examine the interpretation, rationale and ratio decidendi in *PJD Regency* to give the same and consistent meaning to the Sarawak housing development legislation. Given such context, there is lack of clarity in the grounds of judgment of the High Court as to why the legal principles in *PJD Regency* could not be made applicable to the Sarawak housing legislation.

[63] We repeat that the same interpretation ought to be given to reg 9(4) of the Sarawak HDR 2014 which is applicable to the instant appeals as it is worded virtually identically to reg 11(2) of HDR 1989 which plainly prohibits developers from collecting booking fees. The Federal Court in *PJD Regency* could not have expressed its conclusion any more clearly than this:

> [48] In our view, the intention of Parliament is unequivocal. From the *Hansard* in 1966, to the change in the subsidiary legislation up to the amendment to the HDR 1989 in 2015, the written law in force has made it crystal clear that the collection of booking fees is to be absolutely prohibited.

[64] As stated earlier, to date the execution of the SPA only when the full first 10% of the purchase price has been paid instead of at the time payment of a booking fee or a lesser deposit is made would have the patent effect of exposing the house buyers to further vulnerabilities and unscrupulous developers. *PJD Regency* expressed the drawback lucidly in the following terms:

> [86] The other reason that attracts the application of these foundational principles of contract law is to ensure maximal protection of the purchasers having regard to the social purpose of the HDA 1966 and its subsidiary legislation. At the risk of repetition, if the ten percent deposit is paid at the same time of the signing of the agreement, there would be no issue of there being separate dates for calculating the LAD. Having bound themselves to a bargain by collecting the booking fee and procuring a signed pro forma and top of it being responsible for drafting the final formal agreement, the developers have thereby put the purchasers in a disadvantageous position. The problem this poses is that the developers may abuse the opportunity to put whichever date they wish with a view to extend the date to deliver vacant possession. We can see, for example, that this was the case in *Hoo See*

A *Sen* where the formal agreement was only signed seven months after the booking fee was paid.

B **[65]** It was also highlighted by the Federal Court that permitting the contrary position would allow the developers not only to benefit from the booking fees collected in contravention of the law but also manipulate the date of the SPA for purposes of the LAD.

C **[66]** In the instant case, the appellant house buyers were made to pay a booking fee and sign a booking form. The booking fees ought to have been attached to the first 10% deposit because under the aforementioned regs 9(1) and 9(4) of the Sarawak HDR 2014, any payment collected (which could be for less than 10%) could only be made pursuant to the statutorily prescribed SPA, just like the position under the HDR 1989.

D

[67] In other words, the payment of the initial 10% deposit and the signing of the SPA ought to have been done simultaneously and the issue of the date of commencement of LAD would not arise. The date of the SPA should accordingly be the payment date of booking fees.

E

[68] It is also apposite for us to mention the decision of this court in *Sri Damansara Sdn Bhd v Voon Kuan Chien & Anor* [2020] 4 MLJ 265; [2020] 5 CLJ 619 where in the judgment written by Lee Swee Seng JCA, it was held that

F in light of reg 11(2) of the HDR 1989 prohibiting the collection of any prior payment before the signing of the SPA, to allow a collection of a booking fee or a deposit of less than 10% of the purchase price before the signing of the SPA would be repugnant to the whole purpose of the HDA 1966 and the HDR 1989. Instead it would permit a mode of payment outside the protection

G afforded under the law which does not envisage any other collection of part of a purchase price other than a 10% of it upon the signing of the SPA (unless the developer wants to give the purchaser a more favourable term and that can only mean the signing of the SPA even when less than 10% of the purchase price had been collected). It was further stated as follows:

H [32] A developer who chooses to collect less than the 10% of the purchase price must be prepared to sign the SPA for there is no prohibition in granting a more favourable term to the purchaser.

[33] To sanction a payment without the signing of the SPA would go against both the letter of the prohibition in reg 11(2) and the spirit and the statutory scheme of

I the Schedule H of the SPA.

[35] It is irrelevant that the purchaser consented to it because the HDA and the Regulations are there to protect the purchaser and the prohibition would have no bite if a booking fee or a deposit less than 10% of the purchase price is collected without the signing of the SPA.

> [36] It is also irrelevant that the purchaser could only pay the 10% of the purchase price much later and so when it was paid the SPA was dated. Such a mischief in the circumvention of the prohibition on collection of a booking fee is precisely what the HDA and the Regulations were designed to arrest. Therefore, the courts had no problem calculating the late delivery claim from the expiry of the period of completion from the date the booking fee is paid and not from the date of the SPA for to take the SPA date would be to allow the perpetuation of a practice that the Regulations prohibit.
>
> ...
>
> [59] Being a social piece of legislation, the court should interpret the standard form Schedule H of the SPA in a manner in which the purchaser would not be taken advantage of or exploited in any way or made to bear an unconscionable term.
>
> ...
>
> [94] We dare not go down the slippery slope of indirectly sanctioning a collecting of booking fee or any amount less than the first 10% of the purchase price by whatever name called, without the SPA being signed, for that would open the floodgates to a developer introducing too many conditions with respect to matters prohibited by the HDA and the Regulations when receiving the booking fee.

[69] We were accordingly of the view that on the proper construction of the Sarawak HDO 2013 and the Sarawak HDR 2014, the calculation for the LAD for the delays in the delivery of vacant possession begins at the time any booking fee is collected from a prospective house buyer. This is the point in time when the SPA should be rightfully entered into by parties and accordingly dated. Regulation 9(4) of the Sarawak HDR 2014 plainly prohibits the collection by a developer of any payment otherwise than in accordance with the statutorily-prescribed contract of sale entered into between the house buyer and the developer. Regulation 9(4) renders illegal the practice of collecting booking fees in connection with the sale of homes by a housing developer unless made in accordance with the said contract. At the same time, when construing the terms of the form of contract in Form C of the Schedule to the Sarawak HDR 2014, regard ought to be had to the purpose of the Sarawak HDO 2013 and Sarawak HDR 2014 rather than to the mere literal meaning of the words used.

[70] For emphasis, we found much support for this approach in the judgment of the Federal Court in *PJD Regency* which stated that given the clear legislative intent in the HDA 1966 and the HDR 1989, the clauses in the scheduled could not be read literally. It cannot be emphasised enough that the legislative aim is that any payment collected must be in accordance with the terms of the statutory contract for sale (the prescribed SPA).

[71] And that where there is payment of booking fee, the date of the contract cannot be taken to mean the date printed on the scheduled contracts.

Otherwise, this would be condoning the developer's attempt in this case to bypass the statutory protections afforded to the house buyers put in place by the legislative scheme.

[72] Similarly, the same reasoning would apply in connection with the Sarawak HDO 2013 and the Sarawak HDR 2014 in light of the same legislative intent and the almost identical relevant statutory provisions to the corresponding respective requirements in the HDA 1966 and the HDR 1989. The date of the SPA to buy and sell the property must thus be taken to be the date on which any booking fee has been paid by the house buyers. The learned JC we must emphasise did not even ask whether the Sarawak HDO 2013 and the Sarawak HDR 2014 were social legislation, and never discussed the differences between reg 11 of the HDR 1989 and reg 9 of the Sarawak HDR 2014, let alone analysed the scope of reg 9(4) of the Sarawak HDR 2014.

[73] In the instant case before us, the Tribunal's (the second respondent in Appeals 174, 175 and 176 and the appellant in Appeals 220 and 221) decision was based on the ratio decidendi in *PJD Regency* that if booking fee had been paid by the house buyers, the calculation of LAD should run from the date the buyer paid the booking fee to the developer. The ground of award of the Tribunal stated thus:

> By referring to the Federal Court decision between *PJD Regency Sdn Bhd and Tribunal Tuntutan Pembeli Rumah & Anor* and other appeals, the calculation of Liquidated Ascertained Damages (LAD) begins from the date of payment of booking fee and not from the date of the Sale and Purchase Agreement (SPA) is signed.

[74] The awards made by the Tribunal in the instant case, set aside by the High Court, unmistakably followed *PJD Regency*. It is true, as contended by the first respondent, that the HDA 1966 and HDR 1989 do not apply in Sarawak. But both the HDA 1966 and the Sarawak HDO 2013 are social legislation and as discussed earlier, contain very similar provisions in respect of the sale and purchase of housing units, as are the key issues in *PJD Regency* and in the instant case. And we must stress that *PJD Regency* is far from being a decision on its own peculiar facts (that the date of calculation of the LAD runs from the date the booking fee was paid and not from the date of signing of the SPA) because *PJD Regency* in fact affirmed the ratio in the earlier Supreme Court cases of *Hoo See Sen* and *Faber Union* to such effect.

[75] The learned JC also stated that parties did not dispute that the payment of booking fees was a common and longstanding practice in Sarawak, and that there was no record of any housing developer in Sarawak being prosecuted for accepting booking fees. The first respondent too repeated this in submission before us.

[76] We disagree. That it is being practised and not a single developer having been prosecuted is no legitimate basis to contend it is not unlawful or illegal. The Federal Court in *PJD Regency* had also firmly dealt with this contention, as follows:

> [77] In these appeals, the prime idea behind the legislative framework is that the developers should be confined to a set timeline. Booking fees are prohibited yet the developers have continued to brazenly flout the law by calling it standard practice. At the same time, they very boldly demand that the statute be construed in their favour by strictly limiting the commencement period to the dates printed in those contracts.
>
> ...
>
> [131] While the developers might think that it is a standard commercial practice to accept booking fees, the development of the law clearly suggests to the contrary. The courts will not condone such a practice until and unless the law says otherwise.

[77] The learned JC did not consider this pronouncement in *PJD Regency* at all.

[78] The fact is, nowhere in the *Hansard* was there discussion that booking fees should be allowed.

[79] The learned JC further made specific mention that 'This practice of booking fees was even noted during the debate on the bill for the Sarawak Ordinance 2013'. In support, the relevant excerpts of the passages in the *Hansard*, which was from the speech by YB Dr John Johnical Rayong Ngipa were also reproduced in the grounds of judgment of the learned JC. But one cannot fail to appreciate that even from a cursory read of these very passages referred to by the learned JC, the point made by the YB was, to the contrary, precisely that 'There should be no booking fee as this can cause speculation'. The said relevant passages relied on by the learned JC read as follows:

> With the Bill in question, there will be better control and supervision of housing developers. The licensing of developers will ensure that only those with good financial records and performance will be issued the license. I would like to propose here that the licenses should be classified into different categories similar to that of JKR contractor License, that is, Class A being the highest grade and Class F as the lowest grade. Such classification will give the house buyers the choice in determining which developers whom they wish to purchase from. The Ministry of Housing should work out the different categories of house developer licenses.
>
> *Another unfair practice currently done by the housing developers is taking the 10% deposit, sepuluh peratus deposit as down payment*. Under such practice, the housing developers practically use the buyers' money to develop the housing project. On taking the 10% of the cost of the house, he starts to carry out the preliminary works and on completion will get the buyers to pay progressively until the completion of

A the house. The developer in fact comes out with little or no capital at all and instead using the purchaser's money to build.

I would propose that the buyer should only start paying progressively after the developer has competed at least 25% of the work and the final 10% can only be released upon receipt of the land title. *There should be no booking fee as this can cause speculation*. Currently, one of the factors that allow buyers to pay a booking fee. For example, a speculator will book *sepuluh buah rumah*. Ten houses for nominal booking fee each. *When all the houses have been booked, the developers will tell potential buyers that all the houses have been sold. The speculators will then start selling their booked houses at a higher price. This causes the house price to increase* .... (Emphasis added.)

[80] This was erroneously not appreciated by the learned JC. This further weakens the case of the first respondent.

D Whether payment of booking fee constituted an option to purchase

[81] In arriving at the conclusion that the LAD for the delay should be calculated from the date of the SPAs, the learned JC found that, contrary to E *PJD Regency*, no sale and purchase agreement had been formed at the time of the payment of the booking fee. It was held that the payment of booking fees was merely an option to purchase granted by the developer to the prospective house buyer and that by exercising the option the buyer would be purchasing and entering into a sale and purchase agreement.

F

[82] This is how the High Court dealt with this issue:

[19] The court further found that all that had happened was the prospective purchaser and the developer had entered into an agreement whereby in consideration of the payment of the booking fee, the developer had granted a right G or option to the prospective purchaser to purchase the respective unit, to the exclusion of others.

[20] In other words, the developer had granted the prospective purchaser an option to purchase.

H [21] Further to this option agreement, the prospective purchaser would exercise the option to purchase by entering into a sale and purchase agreement with the developer and in the view of the court, this was when the sale and purchase agreement was formed.

I [22] The court was further of the view the payment of a booking fee in such a scenario would not contravene any regulations requiring the instalment payments under a sale and agreement to be paid in the manner prescribed under the regulations.

[83] Thus, the High Court found that as the option (purportedly granted on the payment of booking fees) was exercised upon the entry of the scheduled contract (the prescribed SPA), there would be no contravention of the provision that payments must be made in accordance with the terms of the scheduled contract under the Sarawak HDR 2014.

[84] This proposition is not entirely unattractive. However, we found it difficult to accept this analysis on the legal effect of the payment of booking fees. We say so for a number of reasons. First and foremost, nowhere in the Sarawak HDO 2013 or the Sarawak HDR 2014 (or the HDA 1966 and the HDR 1989 for that matter) is it mentioned that any such or other payment gives rise to any form of option. And the first respondent too could not identify any of the provisions of the Sarawak housing legislation which explicitly provides for an option to purchase the same. Neither did the learned JC mention a single case authority to support this concept of 'an option to purchase' in the context of the Sarawak HDO 2013 and the Sarawak HDR 2014.

[85] Secondly, as has been more than amply shown above, the collection of any payment except as prescribed by the contract of sale is prohibited under reg 9(1) and (4) of the Sarawak HDR 2014. The payment to the first respondent of the booking fees which is not accompanied with the execution of the SPA as required under the prescribed SPA pursuant to the said Regulation is in the first place already prohibited, pure and simple. Thus, the said payment being a form of an option does not and cannot arise.

[86] Thirdly, instead of applying the clear principles enunciated by the Federal Court in *PJD Regency* given the undoubted similarities of issues and provisions of law, the High Court in the instant case chose to rely on differently worded housing development rules which apply in Sabah and in the Republic of Singapore. The Sabah Housing Development (Control and Licensing) Rules 2008 in its reg 10 however not only expressly allows collection of booking fees but also defines booking fee as any payment which gives the purchaser an option or right to purchase. And pursuant to the Singapore Housing Developers Rules, the option to purchase is expressly granted to the prospective purchaser (rr 10 and 11), whilst a booking fee or any other payment must be paid to the developer before the right or option to purchase is granted (r 8).

[87] These provisions are nonetheless nowhere found in the Sarawak HDO 2013 or Sarawak HDR 2014, despite the Sabah Housing Development (Control and Licensing) Rules 2008 having been issued earlier in time. It is also noteworthy that provisions for options to purchase did exist under the Peninsular Malaysia's HDA 1966, specifically in r 10(3) of the Housing

A Developers (Control and Licensing) Rules 1970 but this had been repealed in subsequent amendments.

[88] Fourthly, even if the payment of booking fees could somehow be construed as an option to purchase, given the point on the status of social legislation, the LAD calculation should rightfully still begin from the date of such booking fee payment in order to ensure genuine and meaningful protection to the prospective house buyers who could otherwise be disadvantaged by the developer dictating the amount of fees to be paid and the terms and conditions attaching to such payment even before the purported option could be granted.

[89] Fifthly, there was in fact nothing in the booking forms signed by the three appellants in these appeals that could be construed as granting to the house buyers or any one of them such an option. There was absolutely no mention in the forms that any payment of booking fees created an option in favour of the house buyers, or any other party.

[90] Sixthly, on the contrary, whilst the booking forms — we agreed with the submission of the appellants and the second respondent — did not at all suggest that the booking fee payment had granted the house buyers an option to purchase, very tellingly, it was instead expressly stated in the booking forms that such booking fees was to secure confirmation of the sale of the relevant units to the house buyers, who agreed to execute the SPA within 30 days there from, where upon such signing, the requisite and relevant balance ought to be paid (thus meaning that the booking fee is part of 10% deposit as required under the Third Schedule to Form C of the Sarawak HDR 2014).

[91] Further, the one only exit clause stated in the booking forms permitting a house buyer not to proceed to purchase was in the event his or her loan application was declined. This therefore seemed to militate against the existence of any purchase option for the buyers to determine whether or not to exercise, in order to purchase the relevant unit. This further supported the contention that the booking fee was already part of the sale and purchase consideration of the unit and not an option to purchase. However, the learned JC did not even examine the booking forms in his grounds of judgment.

[92] As stated in *PJD Regency*, and on a true construction of the relevant provisions of the HDA 1966 and the HDR 1989 — and therefore, the Sarawak HDO 2013 and the Sarawak HDR 2014, adherence to the scheduled contracts as statutorily prescribed would mean that the payment of the initial ten percent deposit and the signing of the statutory sale and purchase agreement would have to be done simultaneously. This, we venture to add, albeit at the risk of repetition, means that any booking fee payment would constitute an

infringement and not be considered as part of the scheduled instalment payments.

[93] In any event, even if the booking fee could be assumed as part payment of the 10% scheduled instalment, this also bolsters the argument that the calculation of the LAD should begin from the date of the payment of booking fees by the three appellants and not from the date printed on the SPAs in these appeals precisely because the sale and purchase transactions had been entered into at the earlier point in time of the respective payments of the booking fees by the three appellants.

[94] It is all too clear that the formulation of the booking form was at variance with the entire purpose of the enactment of the Sarawak HDO 2013 as a social legislation since this would for all intents and purposes be a backdoor way of introducing additional terms to the prescribed SPA under the Sarawak HDR 2014, which would no doubt be prejudicial to the appellant house buyers, exposing them to vulnerabilities that would make them susceptible to unscrupulous practices by the developers, as similarly observed in *PJD Regency* and *Sri Damansara* which had earlier examined such booking forms. And as stated by the Federal Court in *PJD Regency*, the legislative intent was that the initial payment of monies, in the form of a deposit, would be sufficient to constitute an intention to enter into a contract given that the agreement (statutory SPA) would have to be signed at the same time.

[95] As such, the practice of dating the SPA not on the booking date like in respect of the SPAs for the three appellant house buyers before us does absolutely nothing to remedy the mischief of dating the SPA to a later date. This thus prejudices the house buyers' claim for late delivery and instead affording the developers the opportunity to arbitrarily put whichever date they wish with a view to extending the date to deliver vacant possession, as observed in *PJD Regency*.

[96] As submitted by the appellants, the learned JC did not clearly state what were the similarities or differences in the legislative scheme in both Peninsular Malaysia and Sarawak, much less whether those similarities or differences were material issues. The learned JC did however identify one difference which was in respect of the taking of loans by house buyers as found in cl 4(4) in the prescribed SPA under the Sarawak HDR 2014. This essentially did not provide for any option to the house buyers to opt out of the SPA if he or she failed to get the financing request approved. In contrast, under cl 5 of the prescribed SPA under the scheme of the HDR 1989, any house buyer who failed to get a loan after signing the SPA would only have 1% of the purchase price forfeited and the agreement deemed terminated, with the developer required to refund the balance to the house buyer.

[97] The High Court then held that the options to purchase could be beneficial for house buyers, as such options would enable the house buyers, on the payment of an agreed fee, to secure the desired unit and at the same time the liberty to opt out for various reasons, such as if he or she failed to get financing for the purchase.

[98] We do not see how this difference on the loan provisions, or even the existence of the clauses in the relevant prescribed SPA dilutes, much less override the clear language of prohibition found in reg 9(4) of Sarawak HDR 2014 against the collection of booking fees. The prescribed SPA imposes the duty to obtain loan and to finance the purchase of the unit on the house buyers. Even if it is true that they could encounter problems in securing financing, this certainly is no justification for the developers to infringe reg 9(4), or to read into the relevant clauses of the prescribed SPA what is patently not there, by introducing the option to purchase concept, formulating booking forms and engaging in the collection of booking fees.

[99] In this regard, we need only refer to the following self-explanatory passage from the judgment of the Federal Court in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224; [2019] 8 CLJ 433:

> [57] It is well-established principle of interpretation that the court cannot rewrite, recast or reframe the legislation because it has no power to do so. The court cannot add words to a statute or read words which are not there. It is also well settled canon of construction that words in a statute cannot be read in isolation, their colour and content derived from their context and every word in a statute is to be examined in its context. The word context has to be taken in the widest sense where the court must take into consideration not only the enacting provisions of the same statute, but its preamble, the existing state of law, other statutes in pari materia, and the mischief which the statute is intended to remedy.

[100] It does not escape our attention that the stance of the first respondent before us, like that of the developer in *PJD Regency* on the booking fees vis a vis the relevant legal provisions is contradictory and should be estopped. The Federal Court in *PJD Regency* stated thus:

> [69] The same principle extends to the present appeals. In *Kiriri Cotton*, the courts provided a remedy in restitution beyond what the statute clearly expressed (apart from spelling out penal sanctions against landlords). In other words, the existence of a penalty did not prevent the tenant/plaintiff from obtaining his remedy.
>
> [70] The present case is made even stronger for the purchasers by the fact that the scheme of the HDA 1966, the HDR 1989 and the Scheduled Contracts expressly affords the purchasers a statutorily calculated remedy in the LAD.
>
> [71] *It does not therefore lie in the mouths of the developers to demand that the purchasers*

> *be restricted to the plain words of the law when the developers themselves, by demanding and collecting booking fees, have acted contrary to the express prohibition of reg 11(2).* We wholly echo the sentiment in *Kiriri Cotton* that the onus of compliance with the regulatory scheme of the housing legislation, being social legislation, is on the developers. (Emphasis added.)

[101] In spite of infringing the clear prohibition contained in reg 9 of the Sarawak HDR 2014 by collecting booking fee, the first respondent developer was insisting that the LAD should run from date of the SPA under the same Regulation. It surely does not lie in the mouth of the first respondent developer to demand that the appellants be restricted to the plain words of the prescribed SPA under the Sarawak HDR 2014 (in relation to the requirement on the delivery of vacant possession no later than 36 months from date of the SPA) when at the same time it brazenly infringes the said reg 9 of the same Sarawak HDR 2014.

[102] The non-adherence to the prohibition against collection of payments such as booking fees other than in accordance with the clauses in the prescribed SPA was in the appeals before us exacerbated by the fact of the first respondent developer having admitted in the proceedings before the Tribunal that the building plan for the units purchased by the three appellant house buyers had not yet been approved when the same were sold and booking fees collected from them. Such failure is unquestionably contrary to preamble 5 of the prescribed SPA (Form C) under the Sarawak HDR 2014 which expressly requires the first respondent developer to obtain the approved buildings plans before the sale of the relevant units.

[103] This could patently prejudice the house buyers since the developer could thereafter submit any design of building plan unilaterally, as indeed happened in the case before us where the first respondent did in 2019 varied the plans, drawing and specification without the knowledge of the appellant house buyers. All these came to light as evidence in respect of the three appellants' claim for rectification works which was allowed by the Tribunal, and upheld by the learned JC.

[104] As such, in light of the status of the Sarawak HDO 2013 and the Sarawak HDR 2014 as a social legislation, the clear prohibition against the collection of booking fees, and the absence of any basis for an option to purchase in the prescribed SPA under the Sarawak HDR 2014, the conclusion arrived at by the learned JC that the LAD calculation should be from the SPA date instead of the booking fees payment cannot be sustained and must be set aside.

The appeal on jurisdiction of the Tribunal (Appeal 176)

[105] There was then the issue in Appeal 176 where the High Court had found that the Tribunal had exceeded its jurisdiction by considering a claim in excess of RM150,000. The learned JC in this Appeal 176 found that the claim of the appellant was in excess of RM150,000 such that the Tribunal did not have jurisdiction to hear such claim under s 42(1) of the Sarawak HDO 2013. The High Court therefore granted the order of certiorari quashing the award of the Tribunal.

[106] In this Appeal 176, the appellant house buyer had made a claim for LAD in the amount of RM84,501.86, as well as a claim for remedial works which included defects in the common area for the amount of RM82,552. The aggregate of both sums was clearly more than RM150,000. Under s 42(1) of the Sarawak HDO 2013, the Tribunal shall have jurisdiction to hear a claim which does not exceed RM150,000.

[107] We found however that the Tribunal did not consider the claim for remedial works and instead directed the developer to adhere to the contractual specifications. Examination of the appellant's claim in the requisite Form 1 before the Tribunal disclosed that the claim for remedial and repair works was for RM82,552.80 (as quoted by Sykt Kah Seng Construction) but crucially, the Tribunal had specifically stated in the award that the quotation for the remedial works was not considered by the Tribunal but that the Tribunal had instead ordered the first respondent developer to follow the specifications stated in the building plan. There was thus no necessity to add this quotation amount to the LAD claim sum such that the RM150,000 threshold was as a result not in fact exceeded.

[108] Furthermore, even if such claim item for remedy and repair works was to be taken into account for purposes of Form 1, we found there was much force in the contention that whilst both the LAD claim and the rectification claim concerned the same parcel, they were separate matters of two different claims, in the sense that the former was a non-technical claim whilst the latter, a technical claim.

[109] Significantly, when these separate matters are viewed separately, neither claim would exceed the monetary jurisdiction of RM150,000. This position, in our judgment, does not disregard s 42(4) of the Sarawak HDO 2013 which states that:

> (4) Claims may not be split, nor more than one claim be brought, in respect of the *same matter* against the same party for the purpose of bringing it within the jurisdiction of the Tribunal. (Emphasis added.)

[110] We agreed with the submission of the appellant in this Appeal 176 that split claims was in this case permitted because these two items, albeit in respect of the same property, were not in respect of the same matter — the non-technical LAD claim and technical rectification works claim — which sums in aggregate otherwise would have been prohibited by the aforesaid s 42(4) of the Sarawak HDO 2013.

[111] Furthermore, the Federal Court in *Remeggious Krishnan* had already examined a similar provision found in the HDA 1966, on split claims vis a vis the jurisdiction of the Tribunal for homebuyer claims under the HDA 1966.

[112] We should mention that although the monetary jurisdiction of the Tribunal under the Sarawak HDO 2013 is in relation to a total claim of not more than RM150,000, in Peninsular Malaysia, the jurisdictional remit of the Tribunal for homebuyer claims is not in excess of RM50,000, pursuant to s 16M of the HDA 1966.

[113] Nevertheless, on split claims, s 16Q of the HDA 1966 is identically worded to the above-stated s 42(4) of the Sarawak HDO 2013. Section 16Q of the HDA 1966 states:

> Claims may not be split, nor more than one claim brought, in respect of the *same matter* against the same party for the purpose of bringing it within the jurisdiction of the Tribunal. (Emphasis added.)

[114] In *Remeggious Krishnan*, Harmindar Singh Dhaliwal FCJ, writing for the Federal Court, held as follows:

> *The Jurisdiction Issue*
>
> [14] In any discussion on the HDA 1966, it is necessary to allude to the purpose and objective of the legislation. It is beyond doubt that the HDA 1966 was enacted as a piece of social legislation to protect house buyers. With that in mind, any term or provision in the statute must be interpreted in a way which ensures maximum protection for the house buyers against the developer (see *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162 and *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60; [2021] 2 CLJ 441).
>
> [15] It is therefore imperative that ss 16M and 16Q of the HDA 1966 be interpreted in such a way as to provide protection of house buyers in keeping with the intention of Parliament. Now, s 16M of the HDA 1966 provides that the Tribunal shall have the jurisdiction to determine a claim where the total amount in respect of which an award of the Tribunal is sought does not exceed RM50,000. We noted that the words 'a claim' and not 'all the claims' are used in this section. However, s 16Q of the HDA 1966 provides that the claims may not be split, nor more than one claim brought, in respect of the same matter against the same party

for the purpose of bringing it within the jurisdiction of the Tribunal. We also noted that the word 'matter', instead of 'property' or 'housing accommodation', has been used in this section, the significance of which will become apparent in the discussion that follows.

[16] In the present case, and as alluded to at the outset, the appellant had filed two separate claims in respect of the property. The two claims are the technical claim, grounded on the failure of the respondent to provide adequate ceiling height and protruding beams and pillars with the claim amounting to RM40,000; and the second being the non-technical claim, grounded on the breach of manner of delivery of the property with the claim amounting to RM49,832. Both of the claims, viewed separately, did not exceed the monetary jurisdiction of RM50,000 under s 16M of the HDA 1966.

[17] As mentioned earlier, the Court of Appeal took the position that the words 'same matter' in s 16Q of the HDA meant that the claims filed by the appellant must refer to the same matter, that is, the property. With respect, we think this interpretation is incorrect. As submitted by the appellant's counsel, with which we agreed, if it was Parliament's intention for 'the same matter' to be interpreted as 'the same property' as suggested by the Court of Appeal, the drafters of the legislation would have used the term 'property' or 'housing accommodation'. In fact, the term 'housing accommodation' has been specifically defined in the s 3 of the HDA 1966, as follows:

...

[18] For the aforesaid reasons, we were unable to agree with the Court of Appeal that the words 'same matter' in s 16Q of the HDA must mean the 'same property'. We took the view that the 'same matter' can only mean the same issue or type of claim and not the same property. We, therefore, agreed with the position of High Court that there were two different matters in the present case, ie, one was for technical matter and the other was for non-technical matter. As such, s 16Q of the HDA 1966 was inoperative in the present case.

[115] In light of the above, we were unable to agree with the finding of the High Court that the Tribunal had exceeded its jurisdiction. The learned JC had erred in quashing the award by the Tribunal made in favour of the appellant in this Appeal 176.

[116] Additionally, given our finding in respect of the calculation of LAD to be from the date of the payment of booking fee, the appellant in this Appeal 176 also sought a variation to the computation on the number of days of delay and the LAD to be awarded. This we found was merely consequential, and the High Court has the powers to vary the award as provided under O 53 r 2(3) of the Rules of Court 2012. We therefore agreed that the calculation of the LAD should run from 17 February 2018 which was the expiry of the 36 months when the appellant *first* made the payment of booking fee of RM5,000 to the first respondent on 17 February 2015 for the relevant parcel, instead of the calculation of the Tribunal which made the LAD run from 4 April 2018 which

was the expiry of 36 months of the payment of the *balance* of booking fee made on 4 April 2015 in the sum of RM15,000.

[117] The number of days of delay for the handing over of the said parcel should rightfully be 659 days (instead of 613 days as decided by the Tribunal) calculated from 17 February 2018–8 December 2019 and the delay in completion of common facilities should be 642 days (instead of 600 days as decided by the Tribunal) calculated from 17 December 2018–25 November 2019.

[118] Accordingly, in respect of Appeal 176, we allow the claim for LAD in the amount of RM116,732.73, a variation from the sum awarded by the Tribunal, in order to be consonant with the ruling that the applicable period for delivery of vacant possession should be calculated from the date the first booking fee payment was made, which was on the 17 February 2015 rather than when the balance booking fee was paid, which was on the 4 April 2015.

The first respondent's cross-appeals

Basis of the cross-appeal

[119] The cross-appeals were filed by the first respondent developer in Appeals 174, 175, 220 and 221 seeking a variation of the order of the High Court. This, according to the notices of cross-appeals was against the decision of the High Court that had found that there was no unreasonableness, illegality or breach of natural justice when the Tribunal awarded a sum higher than the house buyer's claim in each of the three appellant house buyers' statement of claim (Form 1) which was never amended.

[120] Thus, for example, in respect of Appeal 175, the award was for RM122,593.78, which was higher than the sum stated in the appellant's own Form 1 claim at RM98,367.95 (excluding rectification works of RM30,647.50) which was never amended. The appellant in this Appeal 175 had calculated LAD to run from the date of the SPA (albeit not accurately computed on the basis of the house buyer claimant's own understanding) whilst the Tribunal applied *PJD Regency* and correctly fixed its calculation from the date of payment of the booking fees. The same issues arose in the other Appeals 174, 220 and 221. The first respondent submitted that the appellants were bound by their own pleadings as per their stated claims in the respective Forms 1.

[121] The High Court quashed part of the award of the Tribunal and instead only gave LAD of RM30,786.54 in respect of Appeal 175 following its ruling that the calculation for LAD ought to be from the date of the SPA. The

appellants in the five main appeals now asked for this Court of Appeal to reinstate the awards of the Tribunal which had calculated the LAD from the date of the payment of booking fees (with some slight adjustments which we have allowed in respect of Appeal 176, as above). These cross-appeals would only be relevant if we allowed the main appeals, which we have.

Whether the cross-appeals are competent

[122] We observed however that the notice of cross of appeal in respect of each of the four appeals did not in fact directly relate to the main appeals brought by the appellant house buyers. It did not for instance seek a variation in the calculation of LAD (which was the very decision being appealed against by the appellants). Instead, in these cross-appeals, the notice challenged the decision of the High Court which did not find any illegality to quash the Tribunal's awards which granted a higher sum than what was pleaded.

[123] Rule 5(4) of the Rules of the Court of Appeal 1994 ('the RCA 1994') provides that an appellant may appeal from the whole or part of a judgment and the notice of appeal shall state whether the whole or part only, and what part, of the judgment is complained of. This the first respondent did not do. But the first respondent did file the notice of cross-appeal under r 8(1) of the RCA 1994 which reads as follows:

> (1) It shall not be necessary for a respondent to give notice of appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the High Court should be varied, he may, at any time after entry of the appeal and not more than ten days after the service on him of the record of appeal, give notice of cross-appeal specifying the grounds thereof, to the appellant and any other party who may be affected by such notice, and shall file within the like period a copy of such notice, accompanied by copies thereof for the use of each of the Judges of the Court.

[124] In a relatively recent decision in *Douglas Ding Jangan & Ors v Kerajaan Negeri Sarawak & Ors* [2021] 4 MLJ 946; [2021] 7 CLJ 653 the Federal Court authoritatively clarified that a cross-appeal under r 8 of the RCA 1994 is only for the purpose of varying the decision of the High Court that is appealed against by the appellant and not for the purpose of reversing or setting aside any decision of the High Court which no party to the action appeals against. The cross-appeal must relate to the appeal brought by the appellant and not otherwise and no variation order under r 8 of the RCA can be made in respect of a non-existent appeal. The words 'hearing of the appeal' in the aforesaid r 8(1) of the RCA 1994 refer to the hearing of the appeal filed by the appellant and the words 'decision of the High Court' in the same sub-rule refer to the decision of the High Court that is appealed against by the appellant.

[125] Crucially though, we emphasise that *Douglas Ding Jangan* further affirmed that where the respondent has given notice of his cross-appeal to the appellant, his notice of cross-appeal is bad in law and of no effect if it is in respect of a decision of the High Court which the appellant did not appeal against and therefore not falling within the ambit of the said r 8 of the RCA 1994.

[126] Now, on the one hand the first respondent would not be expected to appeal against the decision of the High Court which had based the LAD calculation from the SPA date since that is also the position of the first respondent. The first respondent only needed to oppose the appeals filed by the appellants. On the other hand, although the first respondent stated that it filed the notices of cross-appeal in order to vary the decision of the High Court, it is clear from the notices that the cross-appeals were directed against the decision of the High Court which was not a ground or issue in the main appeals. For clarity, the notices of cross-appeals in the four appeals were predicated on the following ground:

> The learned judicial commissioner erred in law and/or in fact in holding that the second respondent (the Tribunal) had not acted, and/or in failing to hold that the second respondent had acted, unreasonably, illegally and/or in breach of natural justice in awarding a sum much higher than the appellant's claim in his statement of claim (Form 1), which was never amended ...

[127] This specific matter being the subject of the cross-appeal was not an issue at all or in any way part of the appeals in Appeals 174, 175, 220 or 221.

[128] We observed that although the notices of cross-appeals stated they sought for a variation of the High Court decision, it appeared that the cross-appeals in fact sought for a completely different order since they cross-appealed for the High Court to hold that the awards of the Tribunal ought to have been held to be illegal, unreasonably granted and was in breach of natural justice since it had allowed for sums higher than the amount claimed by the appellant house buyers which claims in the respective Forms 1 were never amended by the claimants. This suggested that far from asking for a variation of the decision, the first respondent was actually seeking for an order of the High Court that the entire of the awards ought to be quashed.

[129] There was no appeal filed by the appellants against the decision of the High Court in not quashing the awards on the basis that the sums granted by the Tribunal were in excess of the amount specified by the appellant claimants before the Tribunal. The appellants' appeal was against the decision of the High Court to allow LAD on the basis of a calculation of delay from the SPA date. There was therefore in substance nothing to vary in terms of r 8 of the RCA 1994 in respect of the decision of the High Court which did not find the

awards illegal. As such, like in *Douglas Ding Jangan*, we are of the view that for all intents and purposes, the notices were notices of substantive appeal under r 5 of the RCA 1994 disguised as notices of cross-appeal under r 8.

[130] It would therefore not be right for the first respondent before us to mount such collateral attack on the decision of the High Court without filing its own notice of appeal under r 5 of the RCA 1994.

[131] We reiterate that the notices of cross-appeals of the first respondent in this Appeal 175 (and in all of Appeals 174, 220 and 221) did not relate to the appeals brought by the appellants. Thus, whilst the first respondent did give notices of cross-appeals to the appellants, these were bad in law and of no effect as they were against the decision of the High Court which the appellants did not appeal against and therefore not falling within the ambit of r 8 of the RCA 1994. The first respondent's cross-appeals were therefore incompetent since they were directed against the decision of the High Court which the appellants did not appeal against pursuant to r 5 of the RCA 1994. On this ground alone, the cross-appeal must be struck out.

Whether cross-appeals are meritorious

[132] In any event, quite apart from the incompetent cross-appeal, there are in our view no merits in the notices of cross-appeals of the first respondent. As correctly submitted by the counsel for the appellant house buyers, there are no provisions for amendments in the Housing Developers (Tribunal for Housing Purchaser Claims) Regulation 2010, unlike in the Rules of Court 2012 or any rules of procedure applicable in court.

[133] Moreover, the appellant house buyers are lay persons who might not have accurately filled up the respective Forms 1 especially in respect of the duration for LAD calculation and the sums involved. Further, the Forms 1 were submitted to the Tribunal before the decision in *PJD Regency* was pronounced, after which the appellants did ask for the calculation of LAD to commence from the payment of booking fee, and the first respondent developer did not then object to any such amendment. There was no averment made by the first respondent that it had sought time to reply to the computation for the LAD claim to start from the payment date of booking fees.

[134] It has been previously determined by the Court of Appeal in *Hazlinda bte Hamzah v Kumon Method of Learning Centre* [2006] 3 MLJ 124; [2006] 2 CLJ 933 that being a specialist body, the Tribunal has been conferred with extraordinary powers to do speedy justice for consumers. Its awards should therefore not be struck down save in the rarest of cases, such as where it has misinterpreted some provision of the Act in such a way to produce an injustice.

In that same case, the Court of Appeal emphasised that courts should always be mindful that certiorari is not a remedy that is available as of right as it is a discretionary remedy, such that not every error of law committed by an inferior tribunal entitles the High Court to issue certiorari. To justify judicial review, the error must be shown to have occasioned an injustice in a broad and general sense.

[135] We did not find any basis to hold that the Tribunal had committed any error of law when making the awards in favour of the three appellant house buyers. The main issue was the amount of the LAD due to the three appellant house buyers as a result of late delivery of vacant possession. There was certainly no injustice in a broad and general sense.

[136] Additionally, we should also state that the appellants' claims in their respective Forms 1 ought not to be so easily set aside in light of s 42(6) of the Sarawak HDO 2013 which plainly provides thus:

> No proceedings of the Tribunal or award shall be set aside or quashed for want of form.

[137] Fundamentally, as stated above, in delivering its award, the Tribunal had merely, and correctly, relied on *PJD Regency* in its decision to calculate the LAD to start to run from the date of payment of booking fees, in order to ensure adherence to the doctrine of stare decisis (see the Federal Court decision in *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577). This cannot in the slightest amount to the Tribunal having committed any error or that it had in any fashion acted unreasonably, illegally or in breach of natural justice.

[138] We therefore dismissed the cross-appeal of the first respondent in respect of Appeal 175.

[139] The cross-appeal by the first respondent in Appeal 174 raises virtually similar issues as discussed above in respect of Appeal 175, the essence of the complaint being that the Tribunal should not have awarded a sum higher than the appellant's pleaded claim in her Form 1. Here, in Appeal 174, in her Form 1, the appellant claimed from the first respondent a sum totalling RM112,103 which was made up of RM88,882 for LAD (based on the date of the said SPA which began on 26 July 2019) and RM23,221 for non-compliance with building specifications.

[140] Now, like the appellant in Appeal 175, the appellant house buyer in this Appeal 174 did not amend her claim in Form 1. The Tribunal nevertheless awarded a total LAD of RM113,209.20 which was higher than the claimed

A sum of RM88,882, with the Tribunal having relied on *PJD Regency* and calculated the LAD based on the date of the payment of the booking fee which began on 24 April 2018 (being 36 months from the date of the payment of the booking fee by the appellant).

B **[141]** We conclude that as such, our findings on the cross-appeal in respect of Appeal 175, particularly on the non-competent notices of cross-appeals and the unmeritorious cross-appeals would equally apply here, as well as in Appeals 220 and 221, with the result that the cross-appeals in Appeals 174, 220 and 221 were also dismissed.

C

CONCLUSION

[142] In light of the above analysis and reasons, we found that the awards made by the Tribunal were not tainted with any jurisdictional error, illegality, D irrationality or procedural impropriety.

[143] The High Court was therefore in error when it quashed the awards in the manner it did and had misdirected itself given the insufficient judicial appreciation on a number of issues, not least on matters of statutory E interpretation and application of ratio in precedent cases, warranting appellate interference. The learned JC erred in quashing that part of the awards of the Tribunal which had allowed LAD to be calculated from the date of payment of booking fee.

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[144] The High Court Order dated 24 March 2022 in respect of all five appeals was to that extent accordingly set aside. The main appeals in all five appeals were therefore allowed, with costs to the appellants. The first respondent developer was thus ordered to pay LAD to the three appellants as G per the awards by the Tribunal (subject to the variation allowed herein in respect of Appeal 176).

[145] All cross-appeals of the first respondent in Appeals 174, 175, 220 and 221 were dismissed, with costs to the appellants. All orders on costs were H subject to allocator.

Appeals allowed, High Court's decision set aside, developer's cross-appeals dismissed.

Reported by Ashok Kumar

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